No. 92-1556

SUPREME COURT, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1992

**CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; KEITH WILLIAM KERR, as representative of Certain Underwriters, YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), INSURANCE CORPORATION OF IRELAND, P.L.C., ANCON INSURANCE COMPANY (U.K.), LTD., SCAN RE INSURANCE,**

*Petitioners,*

v.

**INTERNATIONAL INSURANCE COMPANY, CLARKSON PUCKLE GROUP, LTD., ERAS (INT'L), LTD., CLARKSON PUCKLE INT'L REINSURANCES, LTD., BAIN CLARKSON, LTD. and SOCIETE COMMERCIALE DE REASSURANCE, S.A.,**

*Respondents.*

**Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## RESPONDENT INTERNATIONAL INSURANCE COMPANY'S BRIEF IN OPPOSITION

FRANCIS D. MORRISSEY
*Counsel of Record*
JOHN W. DONDANVILLE
PAUL B. O'FLAHERTY, JR.
WILLIAM M. SNEED
BARRIE L. BREJCHA
BAKER & McKENZIE
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-8000

*Attorneys for Respondent, International Insurance Company*

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

## QUESTION PRESENTED FOR REVIEW

Whether this Court should exercise its discretion under Supreme Court Rule 10 and issue a writ of certiorari where the Court of Appeals' one-line unpublished order denying a writ of mandamus was manifestly correct, where the underlying orders involve discretionary, case specific rulings on waiver of privilege in discovery, and where the petition fails to present special and important reasons for review.

## SUPREME COURT RULE 29.1 LISTING

The parent companies of International Insurance Company are Crum and Forster, Inc., Xerox Financial Services, Inc., and Xerox Corp. There are no subsidiaries or affiliates of International Insurance Company that are not wholly owned.

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CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; KEITH WILLIAM KERR, as representative of Certain Underwriters, YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), INSURANCE CORPORATION OF IRELAND, P.L.C., ANCON INSURANCE COMPANY (U.K.), LTD., SCAN RE INSURANCE,

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v.

INTERNATIONAL INSURANCE COMPANY, CLARKSON PUCKLE GROUP, LTD., ERAS (INT'L), LTD., CLARKSON PUCKLE INT'L REINSURANCES, LTD., BAIN CLARKSON, LTD. and SOCIETE COMMERCIALE DE REASSURANCE, S.A.,

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---

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## RESPONDENT INTERNATIONAL INSURANCE COMPANY'S BRIEF IN OPPOSITION

## SUPPLEMENTAL STATEMENT OF THE CASE

Respondent, International Insurance Company ("IIC"), is an Illinois insurance company that acted as a nominal "fronting" insurer for an international pool of reinsurers on a series of environmental impairment liability ("EIL") insurance policies issued from 1981 through 1983. Petitioners, Underwriters at Lloyd's, London et al., are certain of the insurance syndicates and companies that were members of the pool that reinsured IIC on these EIL policies. The EIL policies IIC issued were 100% reinsured by the reinsurance pool in 1981 and 1982, and over 98% reinsured by the pool in 1983.

In 1988, IIC paid $19 million to settle a claim brought under an EIL policy it had issued to SmithKline Beckman Corporation ("SKB"). IIC then sought reimbursement from the excess reinsurers. Some of the excess reinsurers paid, but others did not. IIC filed the underlying proceedings in November 1988 against those excess reinsurers who did not pay ("petitioners," herein).

IIC issued its first document request upon petitioners in early 1989. Before petitioners had responded to the request, the magistrate judge issued a ruling defining the scope of the attorney-client and work product privileges in this action, in connection with a document subpoena issued to a third party. Specifically, the magistrate judge found that May 5, 1988, was the earliest date on which the parties anticipated litigation within the meaning of Fed. R. Civ. P. 26. Documents created after this date qualified as work product; documents created before the date did not. In February 1990, approximately one year after IIC issued its document request, petitioners first provided IIC with a log of documents withheld from production on the basis of privilege. Specific privileges were asserted in connection with each document withheld. Numerous documents

were withheld on the grounds of both attorney-client and work product privileges jointly. Other documents were claimed to be withheld on the grounds of either the attorney-client or work product privilege singularly. Notwithstanding the magistrate judge's ruling six months earlier, petitioners withheld numerous documents that were either dated prior to May 5, 1988, or undated under the sole privilege of work product immunity.

Petitioners had filed written objections to the magistrate judge's ruling establishing May 5, 1988 as the first date on which a work product privilege could be asserted. On November 30, 1990, the district judge affirmed the magistrate judge's findings with respect to application of the work product privilege. IIC was, therefore, entitled to production of documents withheld under grounds of work product which either were undated or dated prior to May 5, 1988.

On January 2, 1991—almost one year after its privilege log was produced and almost two years after IIC's request for production—petitioners first asserted a new claim of attorney-client privilege with regard to those documents not protected by the work product privilege under the district judge's November 30, 1990 ruling. On January 10, 1991, IIC moved to compel production of those documents, contending that petitioners' assertion of the attorney-client privilege with respect to the documents at issue was untimely, and that their failure to assert that privilege in their privilege log for a year had effected a waiver. Petitioners suggested that their failure to raise the attorney-client privilege earlier was inadvertent.

The magistrate judge granted IIC's motion to compel and ordered petitioners to produce the documents previously designated "work product only" (about 440 documents) within ten days. The magistrate judge ruled that

petitioners had waived the right to assert the attorney-client privilege by not raising it in their privilege log. The magistrate judge found that petitioners had offered no facts in support of their claim of inadvertence, and concluded that such a claim was not viable in light of the number of documents involved. Although there was considerable dispute in the proceedings below as to how many documents were involved, petitioners now claim that 46 documents are at issue. (Pet. at 10 n.3.) On previous occasions, the number of documents at issue has varied from 40 to 440.

Petitioners subsequently filed a motion to reconsider the magistrate judge's order granting IIC's motion to compel. The magistrate judge denied the motion to reconsider, commenting as follows:

> The functioning of the federal courts depends on attorneys carrying out their duties with some modicum of care and timeliness. More than two years ago IIC was entitled to inspect any unprivileged documents, and to challenge any claim of privilege. The reinsurers claim that no one will be prejudiced if they are permitted to assert their privilege claim belatedly. We point out that the prospect of substantial delay to permit litigating new privilege claims is significant prejudice.

(Resp. to Pet. at 8a.)

Petitioners filed objections to both of the magistrate judge's orders, granting respondent's motion to compel and denying petitioners' motion to reconsider. The district court overruled petitioners' objections and affirmed the magistrate judge's order, which found that petitioners had waived the claim of attorney-client privilege with respect to the documents at issue by failing to raise it initially in their privilege log. The district judge reasoned as follows:

> Our system requires that clients be bound by their attorneys' acts. . . . This is so because "[i]f the lawyers' neglect protected the client from ill consequences, [such] neglect would become all too common. It would be a free good—the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either."

(Resp. to Pet. at 13a.)

> [T]he functioning of federal courts depends on attorneys carrying out their duties in a timely fashion. Permitting litigation of new privilege claims will cost both the parties and the taxpayers additional money.

(Resp. to Pet. at 13a.)

On November 3, 1992, petitioners filed a petition for writ of mandamus with the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit denied the petition without a written opinion on December 22, 1992. (Resp. to Pet. at 15a.)

## SUMMARY OF THE ARGUMENT

This Court's review of an issue on writ of certiorari is warranted only where the petition establishes special and important reasons for such consideration. *See* Supreme Court Rule 10. The Seventh Circuit's denial of petitioners' request for writ of mandamus does not warrant this Court's review for several reasons. First, petitioners have failed to present any special and important reason for this Court's review of this matter. Rulings on privilege issues are committed to the discretion of the district court. Review by this Court on writ of certiorari is not an appropriate remedy for reviewing discretionary rulings on discovery and privilege issues. Second, the Seventh Circuit's denial of the petition for writ of mandamus was

eminently correct. Third, the district court's orders rejecting the assertion of new privilege claims in *seriatim* fashion were a sound exercise of judicial administration, well within the district court's discretion.

## REASONS FOR DENYING THE WRIT

### I.

### RULINGS ON PRIVILEGE ISSUES AND DOCUMENT PRODUCTION ARE MATTERS FOR THE DISTRICT COURT'S DISCRETION, NOT REVIEWABLE BY MEANS OF CERTIORARI.

This Court's review on writ of certiorari is warranted only when the petition establishes special and important reasons for such consideration. *See* Supreme Court Rule 10. "Special and important reasons" imply consideration of an issue "beyond the academic or the episodic." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). Such special and important reasons include, for example, resolution of conflicts among courts of appeals, *see Braxton v. United States*, ____ U.S. ____, 111 S. Ct. 1854, 1857 (1991), and resolution of difficult questions of state-federal relations posed by lower court rulings. *Pate v. Robinson*, 383 U.S. 381, 377 (1966). The Court's scarce resources are "better spent addressing cases that are of some general importance 'beyond the facts and parties involved,'. . . , than in . . . acting as 'self-appointed . . . supervisors of the administration of justice in the state judicial systems,'. . .". *Pennsylvania v. Bruder*, 488 U.S. 9, ____ (1988) (Stevens, J., dissenting). *See also Watt v. Alaska*, 451 U.S. 274, ____ (1981) (Stevens, J., concurring) ("whenever [the Court] grant[s] certiorari in a case not deserving plenary review, [it] increase[s] the likelihood that certiorari will be denied in other, more deserving, cases.")

Above and beyond the usual criteria for certiorari, petitioners face an exceptional burden in this case. The remedy they sought in the court of appeals, the writ of mandamus, is itself an extraordinary remedy. Issuance of the extraordinary writ of certiorari, to compel the extraordinary remedy of mandamus, requires an extremely compelling demonstration of legal entitlement, factual proof, and public importance. It may be said with understatement that the instant petition concerning a waiver of privilege in discovery—a discretionary ruling arising on particular facts—falls short of that exceptional showing.

The instant petition expressly asks this Court to "supervise" the district court's discovery rulings. Petitioners effectively seek to appeal the discovery rulings to this Court, contending that the district court's rulings constitute a departure from the accepted and usual course of judicial protection of attorney-client communications. (Pet. at 14.) However, from the magistrate judge through the court of appeals, not a single dissent appears of record. The uniform treatment of the questions presented in the proceedings below does not suggest that they are difficult or doubtful when confined to the parties and facts of this case, much less that they present an issue of general or special importance.

Courts of appeals have uniformly treated discovery disputes as matters entirely within the discretion of the district courts. *See, e.g. Naartex Consulting Corp. v. Watt*, 722 F.2d 779 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984) (district court has broad discretion in its resolution of discovery problems that arise in cases pending before it). The Seventh Circuit rightly denied petitioners' request for writ of mandamus that would have directed the district judge to permit petitioners to withhold documents requested over three years ago, and ordered produced on

at least four subsequent occasions, on the grounds of a newly-asserted privilege. There is no issue that warrants this Court's review.

Petitioners simplistically rely upon various decisions of this Court, decided on writ of certiorari, in which the Court refined the parameters of the attorney-client and work product privileges and the doctrine of waiver. While these authorities address fundamental issues concerning the attorney-client privilege, they fail to demonstrate why the discretionary, case specific discovery rulings at issue warrant review by this Court on writ of certiorari. None represents a case in which this Court granted certiorari merely to review a lower court's application of existing privilege laws. In *Hickman v. Taylor*, 329 U.S. 495 (1947), this Court addressed "an important problem under the Federal Rules of Civil Procedure": the extent to which a party may inquire into oral and written statements of witnesses, or other information served by an adverse party's counsel in preparing for possible litigation. *Id.* at 497. Similarly, in *Upjohn Co. v. United States*, 449 U.S. 383 (1980), this Court granted certiorari "to address important questions concerning the scope of the attorney-client privilege in the corporate context and the applicability of the work-product doctrine in proceedings to enforce tax summaries." *Id.* at 386.

Certiorari has likewise been granted in cases involving waiver issues where important questions of first impression were presented. For example, in *Commodity Futures Trading Comm'n. v. Weintraub*, 471 U.S. 346 (1985), this Court determined that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications. *Id.* at 358.

The three criminal cases cited by petitioners, although they do not address the issue of waiver of attorney-client or work product privilege in a civil case, further exemplify the level of general importance appropriate for consideration by this Court on writ of certiorari. In *United States v. Nobles*, 422 U.S. 225 (1974), the Court granted certiorari to consider whether a federal trial court can compel defense counsel to reveal relevant portions of the defense investigator's report where defense counsel has sought to impeach the credibility of prosecution witnesses by the investigator's testimony concerning statements previously obtained from the witnesses. *Id.* at 227. In *United States v. Zolin*, 491 U.S. 554 (1988), the question was whether the crime-fraud exception must be established by independent evidence or whether its applicability could be determined by *in camera* inspection of the privileged materials. *Id.* at 556. *United States v. Salerno*, ____ U.S. ____, 112 S. Ct. 2503 (1992), resolved the issue of whether Fed. R. Evid. 804(b)(1), an exception to the hearsay rule, permits a criminal defendant to introduce grand jury testimony of a witness who asserts the Fifth Amendment privilege at trial. 112 S. Ct. at 2505.

Although the Court has granted certiorari in cases where a court of appeals previously denied a petition for writ of mandamus, the cases—including those cited in petitioners' brief—involve issues of general importance which warrant this Court's review. In *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court*, 482 U.S. 522 (1987), the Court considered whether the Hague Evidence Convention deprives the district court of jurisdiction to order a foreign litigant to produce evidence physically located within a signatory nation. In *Mallard v. United States Dist. Court*, 490 U.S. 296 (1988), the Court granted certiorari "to resolve a conflict among the Courts of Ap-

peals as to whether 28 U.S.C. § 1915(d) authorizes compulsory assignments of attorneys in civil cases." *Id.* at 300.

Petitioners' reliance on the foregoing decisions of this Court to support this Court's review in the present case is wholly misplaced. The proceedings below present no comparable question of general or special importance which warrants the expenditure of this Court's limited resources. To the contrary, the Seventh Circuit's denial of the mandamus petition in a one-line unpublished order, following unanimous rulings by the magistrate judge and district court, suggests that the present petition presents neither a difficult issue, nor one of any public or precedential importance.

## II.

## THE COURT OF APPEAL'S ORDER DENYING THE PETITION FOR WRIT OF MANDAMUS WAS MANIFESTLY CORRECT.

### A. Discretionary Rulings On Privilege Issues And Document Production Are Not Reviewable Through Mandamus.

The writ of mandamus is traditionally used "only 'to confine an inferior court to lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " Mandamus will not issue to correct or supervise the exercise of discretion, on issues committed to the discretion of the district court. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978) ("where a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.' "); *United States v. Darfman*, 690 F.2d 1217, 1224 (7th Cir. 1982) ("mandamus will not lie to control the judicial discretion of the judge or

court"). The writ will be granted only where the petitioner has shown that the district court committed a "clear error or law" (*see Sporck v. Peil*, 759 F.2d 312, 314 (3d Cir. 1985), *cert. denied*, 474 U.S. 903 (1985)), and issuance of the writ must be "clear and indisputable." *Kerr v. United States Dist. Court*, 426 U.S. 394, 403 (1976).

Under Fed. R. Civ. P. 26, federal district courts are empowered to settle disputes about the scope of discovery. *See Identiseal Corp. v. Positive Identification Systems, Inc.*, 560 F.2d 298 (7th Cir. 1977). *See also Naartex Consulting Corp. v. Watt*, 722 F.2d 779 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1210 (1984) (district court has broad discretion in its resolution of discovery problems that arise in cases pending before it). A party seeking to assert the attorney-client privilege or the work product doctrine as a bar to discovery has the burden of establishing that either or both is applicable. *Barclays-American Corp. v. Kane*, 746 F.2d 653 (7th Cir. 1984). Moreover, it is the burden of the party asserting privilege to show that the privilege was not waived. *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982).

The district court clearly possessed the judicial power and discretion to overrule petitioners' assertion of work product immunity and to deny petitioners' later attempt to invent new and different privilege claims with respect to the same documents. To the extent the district court exercised its discretion, in an area in which it had the power to act, this matter was not appropriate for review either by the Seventh Circuit through the extraordinary writ of mandamus, or by this Court on writ of certiorari.

**B. The District Court Exercised Sound Discretion In Ruling That Petitioners Had Waived Their Right To Assert Additional Privileges After Their Original Privilege Claims Were Rejected.**

Both district courts and courts of appeals have held that a party waives a claim of privilege by not raising it in a timely manner under Fed. R. Civ. P. 34. *See, e.g., Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 74 (7th Cir. 1992) (noting that privilege objection was probably waived by party's failure to object when disclosure was due); *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991) (one who fails to make a timely objection may be held to have waived the privilege); *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540 (10th Cir. 1984) (the assertion of work product privilege not enough to establish that the privilege clearly applied, and plaintiff waived its claim by not raising it in time); *Jones v. Ada S. McKinley Community Serv.*, No. 89 C 0319, 1989 U.S. Dist. LEXIS 14312, p.6 (N.D. Ill. Nov. 28, 1989) (Kocoras, J.) ("failure to raise the work product privilege until almost four months after the discovery request was filed constitutes waiver"); *Krewson v. City of Quincy*, 120 F.R.D. 6 (D. Mass. 1988); *Carey-Canada, Inc. v. California Union Ins. Co.*, 118 F.R.D. 242, 249 (D.D.C. 1986); *Perry v. Golub*, 74 F.R.D. 360, 363 (N.D. Ala. 1976); *see also* 4A Moore's Federal Practice at ¶34.05[2].

In the proceedings below, petitioners utilized nearly a year from the issuance of IIC's production request to review documents and assemble their privilege log. Specific assignments of privilege were made as to each document. While work product alone was assigned to the documents in question, both attorney-client and work product privileges were invoked as to many other documents. Therefore, the assertion of work product alone, and the omission of any attorney-client claim on the subject documents,

was the product of a lengthy, deliberate analysis. By virtue of magistrate judge's August 29, 1989 ruling, petitioners were on notice for six months before the privilege log was produced that their work product claims for documents other than those dated after May 5, 1988 were suspect at the very least. They nevertheless produced a log asserting that the documents at issue was subject only to the work product privilege, and they persisted in their reliance upon only the work product privilege for an additional nine months, until the district court affirmed the magistrate judge's ruling. Only then was a claim of attorney-client privilege first asserted. This sequence of events compels the conclusion that petitioners chose to adopt a "wait and see" strategy respecting the district court's treatment of the work product issue, while holding attorney-client privilege in reserve, to be asserted *seriatim* if their work product claims were unsuccessful. The magistrate judge, the district judge, and the court of appeals were correct in unanimously refusing to countenance such tactics.

Although petitioners contended that waiver should not occur through their inadvertence, inadvertence was not the basis for the rulings below. Both the magistrate judge and the district judge found that the omission of an attorney-client privilege claim was the result of an error of judgment on the part of the person reviewing the documents, as opposed to inadvertence. (Resp. to Pet. at 8a, 12a.) Citing the case of *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 666 F. Supp. 1148 (N.D. Ill. 1987), the district judge acknowledged that "a party's conduct [cannot] be characterized as inadvertent, in order to preserve privilege claims, when it had screened its files and examined every document in question for privileged matter earlier in the litigation." (Resp. to Pet. at 12a); 666 F. Supp. at 1154.

Both the district judge and the magistrate judge further found that an attorney has authority to waive the attorney-client privilege with respect to documents produced in discovery, absent a showing that the attorney was acting outside the scope of his or her authority. (Resp. to Pet. at 8a, 12a.) Citing *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986), the district judge similarly reasoned that "[o]ur system requires that clients be bound by their attorneys' acts. . ." (Resp. to Pet. at 13a.)

Both the district judge and the magistrate judge thoughtfully contemplated the consequences of permitting the belated litigation of new privilege claims. The magistrate judge commented that "[t]he functioning of the federal courts depends on attorneys carrying out their duties with some modicum of care and timeliness," and that "the prospect of substantial delay to permit litigating new privilege claims is significant prejudice." (Resp. to Pet. at 8a.) The district judge expressly endorsed that analysis, acknowledging that "the functioning of federal courts depends on attorneys carrying out their duties in a timely fashion. Permitting litigation of new privilege claims will cost both the parties and the taxpayers additional money." (Resp. to Pet. at 13a.)

Petitioners' suggestion that they should not have been precluded from asserting the attorney-client privilege because IIC "supplemented" its privilege logs (Pet. at 6) misstates the record, with which the district court was intimately familiar in making its rulings. Although no party was prevented from supplementing privilege logs as the issues in the case expanded and new privileged documents were found, the assertion of successive privilege claims for records already identified—after the initial privilege claims were rejected by the court—was never

contemplated. There was no evidence submitted either in the proceedings below or before this Court to establish any agreement or acquiescence on IIC's part to the *seriatim* assertion of successive privilege claims over the same documents. The parties discussed a reassessment of their privilege claims, with a view toward withdrawing questionable claims, not asserting new claims after the old ones failed.

The district court exercised sound discretion in ordering that petitioners had waived the claim of attorney-client privilege as to the documents at issue by failing to raise it in their privilege log. It cannot be said that this ruling was clearly erroneous, much less that the petitioners' entitlement to relief was clear and indisputable. Both the district judge and magistrate judge have sought to administer this complex action as fairly and expeditiously as possible by refusing to permit petitioners to engage in the serial assertion of privileges with respect to documents requested more than four years ago. If petitioners' position were accepted, this case would grind to a halt in terms of document production. Every time a district court overruled a party's privilege claims, the party could assert new claims and start the process all over again, replete with multiple briefs before the magistrate judge, motions to reconsider, objections to the district judge, a petition for mandamus to the Seventh Circuit and, ultimately, a petition for writ of certiorari to this Court.

The Seventh Circuit correctly denied petitioners' request for a writ of mandamus below. In this Court, petitioners fall far short of justifying issuance of the extraordinary writ of certiorari, to compel the extraordinary writ of mandamus below.

## CONCLUSION

For the reasons set forth above, Respondent International Insurance Company respectfully requests that the Court deny the Petition.

Respectfully submitted,

FRANCIS D. MORRISSEY
*Counsel of Record*
JOHN W. DONDANVILLE
PAUL B. O'FLAHERTY, JR.
WILLIAM M. SNEED
BARRIE L. BREJCHA
BAKER & McKENZIE
130 East Randolph Drive
Chicago, Illinois 60601
(312) 861-8000

*Attorneys for Respondent,*
*International Insurance Company*

# APPENDIX

[Dated December 27, 1991]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| INTERNATIONAL INSURANCE COMPANY, Plaintiff, | ) | |
| v. | ) | No. 88 C 9838 |
| CERTAIN UNDERWRITERS AT LLOYD'S LONDON, et al., Defendants, | ) | |
| | ) | Judge Lindberg |
| KEITH KERR, et al., Counter-plaintiffs, | ) | |
| v. | ) | Magistrate Judge Weisberg |
| INTERNATIONAL INSURANCE COMPANY, Counter-defendant. | ) | |
| INTERNATIONAL INSURANCE COMPANY, Counter-defendant/Third-party plaintiff, | ) | |
| v. | ) | |
| SOCIETE COMMERCIALE DE REASSURANCE S.A., et al., Third-party defendants. | ) | |

Magistrate Judge's Ruling on Defendant Reinsurers' Motion to Reconsider February 14, 1991 Ruling on Plaintiff's Motion to Compel

This discovery dispute is now more than two years old, and we briefly review its history. On August 29, 1989 this court ruled that the work product doctrine did not protect certain documents created before May 5, 1988 because litigation over the SKB claim was not anticipated before that date. On November 13, 1990 the reinsurers' objections to that ruling were overruled by Judge Lindberg. In a letter dated January 2, 1991, Pl. Mo. to Compel of January 10, 1991 Exh. D, counsel for the reinsurers told IIC's counsel that certain documents were being withheld on the basis of attorney-client privilege. Only work product immunity, not the attorney-client privilege, had previously been claimed for these documents.

On January 10, 1991 IIC moved to compel production, contending that the documents were not protected by the privilege, and that the reinsurers had waived the privilege with respect to them by failing to raise it in their privilege log. We granted the motion on February 14, 1991, finding that the reinsurers had waived the claim of attorney-client privilege by not raising it in their privilege log. We noted that the reinsurers had offered no facts in support of their claim of inadvertence, and such a claim was not plausible in view of the number of documents involved.[1] We also found no evidence that the parties had agreed that privilege logs could be amended to assert new claims of privilege for the same documents.

The reinsurers filed this motion to reconsider on March 1, 1991. Consideration of this and other motions was stayed while the court considered the question of diver-

[1] There has been considerable dispute as to how many documents are involved, but the reinsurers acknowledge sixty-two documents. Def. Reply at 7.

sity jurisdiction. After reviewing the briefs, we deny the motion to reconsider. Because the original ruling was oral, we will present here in writing the reasons supporting it at greater length than would be warranted by the motion to reconsider taken by itself.

The purpose of privilege logs is to inform opposing counsel of claims of privilege for documents whose production is required. Such claims are normally considered and ruled on at the time documents are to be produced in response to a Rule 34 document request. Document production and preparation for trial are delayed if additional privilege claims are permitted to be raised after privilege logs have been delivered and the court has ruled on the disputed issues based on those logs.

One way to require the timely assertion of privilege claims is to hold that failure to raise a question of privilege in a timely manner waives the privilege. "Waiver" can have two meanings here. It can mean a decision to relinquish the right to preserve the confidentiality of the privileged communication. A waiver in this sense is described as the intentional relinquishment or abandonment of a known right. However, the law may also *deem* a right to have been waived whether or not a knowing choice has been made. For example, a party who fails to object to lack of personal jurisdiction or improper venue in a timely manner has waived the objection under Rule 12(h), Fed. R. Civ. P.

There is no express provision in the Rules regarding claims of privilege as such. However, a party is required by Rule 34 to respond to a document request within 30 days (or such time as may be ordered by the court), either stating that inspection and copying will be permitted or stating any objections and reasons for them. If not satis-

fied with the responding party's objections, the other party may move to compel production under Rule 37(a), and the court rules on the objections and either orders or denies production. If there is no objection, it is a violation of Rule 34 to refuse to permit inspection of any documents requested.

The Advisory Committee Comments to the 1970 Amendments of the Federal Rules note in their commentary on Rule 33 that a party who does not make a timely objection to interrogatories risks waiving the objection, and the Committee's Notes on Rule 34 state that essentially the same procedure applies to document requests. A number of district courts have held that one who fails to raise a claim of privilege in a timely manner under Rule 34 has waived it. See, e.g., *Jones v. Ada S. McKinley Community Services*, No. 89 C 0319, 1989 U.S. Dist. Lexis 14312 (N.D. Ill. November 28, 1989) (Kocoras, J.) (work product immunity); *Krewson v. City of Quincy*, 120 F.R.D. 6 (D.Mass. 1988); *Carey-Canada, Inc. v. California Union Ins. Co.*, 118 F.R.D. 242, 249 (D.D.C. 1986); *Perry v. Golub*, 74 F.R.D. 360, 363 (N.D.Ala. 1976); see also 4A *Moore's Federal Practice* at ¶ 34.05[2]; Cf. *Bud Antle, Inc. v. Grow-Tech Inc.*, 131 F.R.D. 179, 182-83 (N.D.Cal. 1990) (late claim of privilege with respect to document actually produced not a waiver).

The Courts of Appeals have not offered any real discussion of the issue. The First Circuit in *Marx v. Kelly, Hart & Hallman, P.C.*, 929 F.2d 8, 12 (1st Cir. 1991), stated that one who fails to make a timely objection may be held to have waived the privilege. In *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540 (10th Cir. 1984), the court denied a petition for mandamus to compel the district court to vacate an order compelling production. The district court had stated both that the bare assertion of work

product was not enough and that the plaintiff had waived its claim by not raising it in time. The Court of Appeals stated that "[t]he applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document," *id.* at 542, and declined to issue the writ. In *Southern Ry. Co. v. Lanham*, 403 F.2d 119, 133-34 (5th Cir. 1968), the district court had rejected the contention that failure to make a timely objection waived the privilege. The Fifth Circuit noted that the privileged materials had not been voluntarily disclosed and found no other circumstances supporting a finding of waiver; it did not address whether waiver was appropriate as a sanction.

In *Eastern Technologies, Inc. v. Chem-Solv, Inc.*, 128 F.R.D. 74 (E.D. Pa. 1989), the court discussed the court's discretion in cases of untimely assertions of attorney-client privilege. Discussing generally the failure to raise timely objections to discovery requests, the court stated that, while failure to object in a timely fashion can result in a waiver, the court has discretion not to order discovery that is patently improper, and that courts generally reserve the harshest sanctions only for the most flagrant violations. Refusing to find the privilege waived, the court stated:

> It is not that we think that the discovery requested is "patently improper"; rather, we think that, given the specific circumstances of this individual case, the failure to object is not such a "flagrant violation" as to warrant "the harshest sanctions." Also, the objection belatedly raised does not relate merely to relevance or to burdensomeness.

*Id.* at 75.

The decisions cited above that held privilege objections waived did not find waiver in the sense of an intentional

relinquishment of a known right, but imposed it in order to enforce obedience to rules of procedure and court deadlines. This case is unusual in that the reinsurers did not neglect to serve IIC with their objections in the form of the privilege log; they omitted their claim of attorney-client privilege while asserting work-product immunity.

In its brief in support of the January 10, 1991 Motion to Compel, IIC treated this as a question of inadvertent disclosure, as if the reinsurers had inadvertently submitted privileged documents to IIC. IIC cited *Bud Antle*, 131 F.R.D. at 183, in which the court held that, although plaintiffs' late claim of privilege with respect to documents already delivered did not waive the attorney-client privilege, their lack of reasonable care in delivering the privileged documents did.

The reinsurers responded that here no disclosure has occurred, but we find the analogy persuasive nonetheless. Like an attorney reviewing documents to be supplied to an opponent, an attorney preparing a privilege log is expected to review documents and determine whether they may be privileged. If avoidance of waiver depends on an attorney's reasonable care in one instance, it should in the other. The reinsurers did not attempt to show reasonable care here.

The reinsurers argue that a waiver should not occur through inadvertence. They cite *Mendenhall v. Barber-Greene Co.*, 531 F.Supp. 951, 954-55 (N.D.Ill. 1982) (Shadur, J.), which held that an attorney's negligent failure to discover privileged letters contained in a file turned over to opposing counsel did not waive the privilege. Viewing waiver as the "intentional relinquishment or abandonment of a known right," the court refused to find a waiver as a result of the attorney's negligence.

While we share Judge Shadur's reluctance to find waiver when it results in "harsh results out of all proportion to the mistake of inadvertent disclosure," *Mendenhall*, 531 F.Supp. at 955 n.8, this was a mistake, if it was a mistake, of greater magnitude and proportionately harder to excuse than that in *Mendenhall*. The attorney reviewing the file in *Mendenhall* merely overlooked the privileged letters. Here, the reinsurers' counsel (or someone acting on their behalf) examined every document in question *for the purpose of determining attorney-client privilege and work product immunity*. We know this was done since work product immunity was claimed for these documents while both work product immunity and attorney-client privilege were claimed for most of the other documents listed in the privilege log. Nevertheless, the attorney reviewing these documents reviewed at least sixty-two documents as to which attorney-client privilege could be claimed and failed to claim it. Further, when the question work-product immunity was being litigated and the court was being asked to determine at what point litigation was actively contemplated, reinsurer's counsel apparently did not return to these documents to see whether the attorney-client privilege might be claimed.

But we need not conclude, following *Bud Antle*, that reasonable care is required. The reinsurers offered no explanation of how this was permitted to occur—and with respect to so many documents. The burden was properly on them to show why their noncompliance with the rule should be excused. Not only did the reinsurers fail to show reasonable care, they failed to show that their omission of an attorney-client privilege claim was the result of inadvertence rather than an error of judgment on the part of the person reviewing the documents.

If it was an error of judgment, it binds the reinsurers. The reinsurers contend, correctly, that only the client, not

the attorney, can waive the privilege. Def. Br. at 3. But while courts would prefer to avoid visiting upon clients the sins of their attorneys, our system requires that clients be bound by their attorneys' acts. *Tolliver v. Northrop Corp.*, 786 F.2d 316, 319 (7th Cir. 1986). An attorney has an implied authority to waive the privilege on behalf of his client. *In re Von Bulow*, 828 F.2d 94, 101 (2d Cir. 1981) (citing *Drimmer v. Appleton*, 628 F. Supp. 1249, 1251 (S.D.N.Y. 1986)). Deciding whether to claim privilege is well within the scope of an attorney's agency. Attorneys customarily prepare privilege logs, and lawsuits would be considerably more burdensome than they already are if things such as privilege logs had to be ratified by properly authorized corporate officers. Absent a showing that the attorney was acting outside the scope of his or her authority, we believe an attorney has authority to waive the privilege with respect to documents to be produced in discovery.

We thus find taking waiver as a voluntary act, that the privilege was waived as a consequence of counsel's unexplained omission. We further believe that waiver is appropriate as a sanction. The functioning of the federal courts depends on attorneys' carrying out their duties with some modicum of care and timeliness. More than two years ago IIC was entitled to inspect any unprivileged documents, and to challenge any claim of privilege. The reinsurers claim that no one will be prejudiced if they are permitted to assert their privilege claims belatedly. We point out that the prospect of substantial additional delay to permit litigating new privilege claims is significant prejudice.

Finally, we add that this motion for reconsideration should not have been brought. The reinsurers stated that "there is no rule governing motions for reconsideration."

Reply at 6 n.3, citing *National Union Fire Insurance Co. v. Continental Illinois Corp.*, 116 F.R.D. 252 (N.D.Ill. 1987) (Shadur, J.). They misread that opinion. Judge Shadur stated, correctly, that there is no provision in the Federal Rules governing motions to reconsider. *Id.* at 253. However, the Seventh Circuit has ruled that motions to reconsider serve a limited purpose: to correct manifest errors of law or fact or to present newly discovered evidence. They are not vehicles for arguments already made or that could have been made on the first presentation of the motion. *Granite State Insurance Co. v. Degerlia*, 925 F.2d 189, 192 n.7 (7th Cir. 1991); *Rothwell Cotton Co. v. Rosenthal & Co.*, 827 F.2d 246, 251-52 (7th Cir. 1987).

While reconsideration may on occasion produce a better result, the court does not have time to reconsider every ruling counsel thinks is wrongly decided, nor should an opponent be required to respond to an argument more than once. The reinsurers had no case law holding that a finding of waiver under these circumstances would be an abuse of discretion or otherwise improper. They had, essentially, a plea for mercy based on a claim of inadvertence with no real explanation. When the court found that insufficient, that should have ended the matter.

The motion for reconsideration is denied.

ENTER: /s/ BERNARD WEISBERG
United States Magistrate Judge

DATE: December 27, 1991
cc: All Attorneys of Record
(See Attached Service List)

[Service List omitted in printing.]

[Dated October 20, 1992]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| INTERNATIONAL INSURANCE COMPANY, Plaintiff, | |
| v. | No. 88 C 9838 |
| CERTAIN UNDERWRITERS AT LLOYD'S LONDON, et al., Defendants, | Judge Lindberg |
| KEITH KERR, et al., Counter-plaintiffs, | |
| v. | |
| INTERNATIONAL INSURANCE COMPANY, Counter-defendant. | |
| INTERNATIONAL INSURANCE COMPANY, Counter-defendant/Third-party plaintiff, | |
| v. | |
| SOCIETE COMMERCIALE DE REASSURANCE S.A., et al., Third-party defendants. | |

## MEMORANDUM AND ORDER

Defendants, Certain Underwriters at Lloyd's London, et al., pursuant to Rule 72(a) of the Federal Rules of Civil

Procedure (FRCP) and Chapter 28 of the United States Code, § 636(b)(1)(A), object to Magistrate Judge Weisberg's February 14, 1991, and December 27, 1991, orders on the grounds that the orders are clearly erroneous and contrary to law.

The events leading up to the orders are as follows. On August 29, 1989, Magistrate Judge Weisberg ruled that the work product doctrine did not protect certain documents created before May 5, 1988, because litigation over the SmithKline Beckman Corporation (SKB) claim was not anticipated prior to that date. On November 13, 1990, the defendants' objections to that ruling were overruled by this court. Counsel for defendants then informed plaintiff's (International Insurance Company) counsel, on January 2, 1991, that certain documents were being withheld on the basis of attorney-client privilege. Previously, only work product immunity, not the attorney-client privilege, had been claimed for these documents. Consequently, plaintiff moved, on January 10, 1991, to compel production of these documents, contending that they were not protected by the privilege and that defendants had waived the privilege with respect to the documents by failing to raise it in their privilege log. On February 14, 1991, Magistrate Judge Weisberg granted plaintiff's motion holding that defendants had waived the claim of attorney-client privilege by not raising it in their privilege log. Defendants then filed a motion to reconsider on March 1, 1991. Magistrate Judge Weisberg denied this motion on December 27, 1991.

Defendants object to Magistrate Judge Weisberg's February 14, 1991, and December 27, 1991, orders and now assert that the attorney-client privilege should not be waived because: 1) their failure to list the attorney-client privilege on their log was an inadvertent mistake, 2) the

parties agreed to produce new privilege logs, and 3) the attorney-client privilege may not be waived by the attorney.

Magistrate Judge Weisberg's ruling was neither clearly erroneous nor contrary to law. FRCP 72(a); 28 USCA § 636(b)(1)(A) (Supp 1992). First, defendants have failed to show any evidence that their omission of an attorney-client privilege claim was the result of inadvertence rather than an error of judgment on the part of the person reviewing the documents. In addition to authority cited by Magistrate Judge Weisberg, *In re Consol. Litig. Concerning Int'l Harvester's Disp. of Wisc. Steel*, 666 F Supp 1148 (N D Ill 1987), is also pertinent to the issue of inadvertence. In that case, this court stated that a party's conduct could not be characterized as inadvertent, in order to preserve privilege claims, when it had screened its files for privileged matter earlier in the litigation. *Id.* at 1154. Similarly here, defendants' counsel (or someone else acting on defendants' behalf) examined every document in question for the purpose of determining attorney-client privilege and work product immunity. After reviewing these documents, they chose to claim work product immunity rather than attorney-client privilege. This court does not find defendants' omission of an attorney client privilege claim an inadvertent act because the defendants first reviewed the documents in question and then made the subsequent decision to label these documents as protected by work product immunity rather than by attorney-client privilege.

Second, no evidence has been presented which indicates the parties agreed that the privilege logs could be amended to assert new claims of privilege for the same documents.

Third, this court finds, as did Magistrate Judge Weisberg, that absent a showing that the attorney was acting

outside the scope of his or her authority, an attorney does have authority to waive the attorney-client privilege with respect to documents to be produced in discovery. Our system requires that clients be bound by their attorneys' acts. *Tolliver v Northrop Corp.*, 786 F2d 316, 319 (7th Cir 1986). This is so because "[i]f the lawyer's neglect protected the client from ill consequences, [such] neglect would become all too common. It would be a free good—the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either." *Id.*

Finally, the functioning of federal courts depends on attorneys carrying out their duties in a timely fashion. Permitting litigation of new privilege claims will cost both the parties and the taxpayers additional money.

ORDERED: The objections of defendants, Certain Underwriters at Lloyd's London, et al., to Magistrate Judge Weisberg's February 14, 1991, order, which found that defendants had waived the claim of attorney-client privilege by failing to raise it in their privilege log, and December 27, 1991, order, which denied defendants' motion to reconsider, are overruled.

/s/ GEORGE W. LINDBERG
United States District Judge

Date: October 20, 1992

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 22, 1992

*Before*

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*

No. 92-3675

IN THE MATTER OF:
CERTAIN UNDERWRITERS OF LLOYDS' LONDON AND COMPANIES IN, INTEREST, KEITH KERR, DENNIS JENNINGS, et al.,

Petitioners.

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Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 88 C 9838 —George W. Lindberg, Judge.

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This matter comes before the court for its consideration of the following documents:

1. PETITION FOR WRIT OF MANDAMUS OF DEFENDANTS AND COUNTER-PLAINTIFFS CERTAIN UNDERWRITERS AT LLOYD'S, ET AL. filed herein on 11/3/92, by counsel for the petitioners.

2. RESPONSE OF PLAINTIFF/THIRD-PARTY PLAINTIFF INTERNATIONAL INSURANCE COMPANY TO PETITION FOR WRIT OF MANDAMUS filed herein on 12/8/92, by counsel.

On consideration thereof,

IT IS ORDERED that said Writ of Mandamus is DENIED and the Petition for Writ of Mandamus is DISMISSED with costs.